

**United States Department of Labor
Employees' Compensation Appeals Board**

S.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

)
)
)
)
)
)
)
)

**Docket No. 08-640
Issued: October 17, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 15, 2007 appellant filed a timely appeal of Office of Workers' Compensation Programs' merit decisions dated December 18, 2006 which denied her schedule award request and her claim for compensation. She also filed a timely appeal of the June 21, 2007 nonmerit decision which denied her reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that she sustained a permanent impairment to a scheduled member; (2) whether appellant established that she was disabled for the intermittent periods from September 20 to October 12, 2006; and (3) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that she did not provide any additional evidence or legal argument to establish that she was entitled to a schedule award.

FACTUAL HISTORY

On July 29, 2006 appellant, then a 40-year-old sales and service associate, filed a traumatic injury claim alleging that on July 23, 2006 she pulled a mail container weighing around 10 to 20 pounds and over extended her left shoulder sustaining a left shoulder strain. On September 28, 2006 her claim was accepted for sprain of the left shoulder, upper arm and rotator cuff.

On October 27, 2006 appellant filed a claim for compensation for the intermittent periods from September 19 through October 12, 2006: September 19, 20, 26 and October 5, 10 and 12, 2006. On November 7, 2006 the Office informed appellant that the evidence was insufficient to support all of the claimed periods of disability and that additional information was needed to demonstrate that she was attending medical appointments on those days as claimed. It accepted appellant's claim for disability on September 19, 2006. On November 29, 2007 appellant submitted another time analysis form removing September 19, 2006 and adding October 17, 2006 to the list of dates in her claim for compensation. Appellant's claims were for one to two hours for physical therapy and doctor's appointments.

On November 1, 2006 appellant filed a schedule award claim. On November 7, 2006 the Office informed appellant that additional medical evidence was needed, specifically a medical report addressing whether her condition had reached maximum medical improvement, a description of any restriction of movement in terms of degrees, description of objective findings, description of subjective complaints and a recommended percentage of impairment of the affected member using the A.M.A. *Guides*, fifth edition. Dr. Fallon H. Maylack, Board-certified in orthopedic surgery, responded to the Office's questions in a November 28, 2006 letter. Dr. Maylack found that appellant had reached maximum medical improvement on October 17, 2006. Additionally he found no restrictions of movement in terms of degree of retained active motion, and no objective findings or subjective complaints. Dr. Maylack opined that appellant had no percentage of impairment of the affected members.

On December 18, 2006 the Office denied appellant's claim for benefits for the period September 20 through October 12, 2006 finding that there was no medical evidence of her missing work due to medical appointments on those dates.

On December 18, 2006 the Office denied appellant's claim for a schedule award finding that the medical evidence of record did not demonstrate that she sustained a permanent impairment. It noted that the medical evidence consisted of Dr. Maylack's report in which he opined that appellant had zero percent impairment of the arm or shoulder.

On April 3, 2007 appellant requested reconsideration of her schedule award claim arguing that her original left shoulder injury occurred in 2002 which led to surgery and that her employer failed to provide immediate emergency medical treatment on July 29, 2006. Copies of documents already in the record were also submitted.

In a June 21, 2007 nonmerit decision, the Office denied appellant's request for reconsideration finding that appellant did not meet the requirements to require the Office to reopen a case for merit review. Specifically appellant did not show that the Office erroneously

applied or interpreted a point of law, nor did she advance a point of law or fact not previously considered, nor submit relevant and pertinent evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of the Office.³ For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁴ Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁵

ANALYSIS -- ISSUE 1

Appellant's claim was accepted by the Office for sprain of the left shoulder, upper arm and rotator cuff. On November 1, 2006 she filed a claim for a schedule award. In a November 28, 2006 report, appellant's physician, Dr. Maylack, opined that she had reached maximum medical improvement but had no impairment of the affected members. He also found no objective findings or subjective complaints. Dr. Maylack's report is the only medical report that addresses whether or not appellant has an impairment, and it does not state that appellant has any impairment. Appellant has not met her burden to establish her claim that she has sustained a permanent impairment as a result of her accepted condition.

LEGAL PRECEDENT -- ISSUE 2

The Board has found that under the Act the term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury.⁶ A claimant, for each period of disability claimed, has the burden of proving by the

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.404.

³ *Michele Tousley*, 57 ECAB 130 (2005); *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781, 783-84 (1986).

⁴ *Michele Tousley*, *supra* note 3; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁵ *Dennis R. Stark*, 57 ECAB 306 (2006).

⁶ *See Robert A. Flint*, 57 ECAB 369 (2006).

preponderance of the reliable, probative and substantial evidence that he or she is disabled for work as a result of the employment injury.⁷

Case law makes clear that an employee is entitled to disability compensation for any loss of wages incurred during the time he or she receives authorized treatment and for loss of wages for time spent incidental to such treatment. The rationale for this entitlement is that, during such required examinations and treatment and during the time incidental to undergoing such treatment, an employee did not receive his or her regular pay.⁸

ANALYSIS -- ISSUE 2

Appellant has an accepted injury for left shoulder, arm and rotator cuff sprain. She claims that due to her accepted injury she was disabled for intermittent periods between September 20 and October 17, 2006 due to physical therapy and medical appointments. Appellant bears the burden to establish through medical evidence that she was disabled during the claimed time period and that her disability was causally related to his accepted injury. The Office informed appellant that she needed to submit evidence that she was attending medical appointments on the claimed days, but no evidence was submitted addressing the claimed disability dates. The Board finds that appellant has not established that she was disabled or attending medical appointments during the claimed intermittent periods as a result of her employment injury.

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of the Act⁹ does not entitle a claimant to a review of an Office decision as a matter of right.¹⁰ The Act does not mandate that the Office review a final decision simply upon request by a claimant.¹¹

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹²

⁷ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *Henry Hunt Searles, III*, 46 ECAB 192 (1994).

⁹ 5 U.S.C. § 8128(a).

¹⁰ *Darletha Coleman*, 55 ECAB 143 (2003).

¹¹ *Donna M. Campbell*, 55 ECAB 241 (2004).

¹² 20 C.F.R. § 10.606(b)(2)(iii) (2004).

ANALYSIS -- ISSUE 3

The Office is required to reopen a case for merit review if an application for reconsideration demonstrates that the Office erroneously applied a specific point of law, puts forth relevant and pertinent new evidence or presents a new relevant legal argument. Appellant did not argue that the Office erroneously applied a point of law or present a new relevant legal argument. She argued that her original shoulder injury was in 2002. While appellant's medical history is new evidence it is not relevant to the issue of whether the medical evidence supports her claim of a permanent impairment to a member related to her accepted condition and therefore is not considered to be new and pertinent evidence and require merit review. She submitted documents with her request but it consisted of copies of documents already submitted and previously considered by the Office. Documents that are duplicative do not constitute new evidence not previously considered by the Office.¹³ As appellant did not submit any relevant and pertinent new evidence she is not entitled to merit review by the Office.

CONCLUSION

The Office properly found that appellant had not established that she sustained a permanent impairment to a scheduled member, that she was disabled on the intermittent periods from September 20 to October 12, 2006, and that the Office properly refused to reopen appellant's case for further review of the merits of her claim.

IT IS HEREBY ORDERED THAT the June 21, 2007 decision and the December 18, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 17, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹³ See *Susan A. Filkins*, 57 ECAB 630 (2006).